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Keeping the Commitment: Why California Should Maintain Consideration of the Commitment Offense in Determining Parole for Life Inmates

by KATHLEEN NOONE*

Introduction

Sandra Davis Lawrence is exceptional.

Approximately five out of the 30,000 inmates serving life sentences in California receive parole each year.¹ Lawrence received parole in 2008, after twenty-three years in prison and many parole denials based on the severity of her commitment offense.

The California prison system is currently in federal receivership because of overcrowding and failing to provide prisoners with sufficient medical care.² The prison system is a mess, and the miniscule number of life inmates receiving parole each year is disheartening. In the California Supreme Court case that bears Lawrence's name, the court took a step towards increasing the rate of parole for life inmates when it clarified that an inmate cannot be denied parole based solely on the severity of his or her commitment offense. Of course, a future court might go a step further, and hold that the commitment offense should not be considered in a parole proceeding *at all*. Several commentators have called for this step to be taken. In this Note, I argue that *In re Lawrence* draws the appropriate line; consideration of the commitment offense is a proper consideration that should not be eliminated from the parole process.

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1. Cathy Cockrell, *Why Parole Doesn't Work in California*, BERKELEY NEWS CENTER, May 6, 2009, http://berkeley.edu/news/media/releases/2009/05/06_crime.shtml.

2. Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES, July 23, 2009, at A24, available at <http://www.nytimes.com/2009/07/23/us/23sentence.html>.

This Note will proceed in four parts. Part I examines the foundations of parole and the California parole system. Part II discusses the federal and state law governing the due process rights of prisoners. Included in Part II is a discussion of *In re Lawrence*, the most recent California Supreme Court opinion on due process violations for inmates serving life sentences. Part III examines the argument that the parole board and Governor should eliminate consideration of an inmate's commitment offense and other backwards-looking factors when making decisions regarding parole. Part IV argues that California should continue to consider an inmate's commitment offense because such consideration not only complies with federal and state due process, but can also provide important information about an inmate's rehabilitative progress.

I. Parole Origins and the California Parole System

A. Parole Origins

Parole is the "conditional release of convicts by a parole board prior to the expiration of their sentence[s]." ³ Parole originates from the French word *parol*, which means "word of honor," in the sense of giving one's word or promise not to take up arms after a conditional release. ⁴

Modern parole derives from a system established on an island penal colony northeast of Sidney, Australia, in 1840. ⁵ Alexander Maconochie, the colony's superintendent, implemented an open ended sentencing structure ⁶ and rewarded inmates with good behavior credits that could hasten the inmate's release date. ⁷ A prisoner's sentence did not end until the prisoner achieved a certain number of credits. ⁸

Parole began in the United States in the late 1870s, applying to first offenders at the Elmira Reformatory, an all-male prison in New York. ⁹ Inmates received credit for good behavior, which could lead to an early release date. ¹⁰ By 1900, every adult reformatory in the

3. HOWARD ABADINSKY, PROBATION AND PAROLE 205 (7th ed. 2000).

4. JOAN PETERSILIA, REFORMING PROBATION AND PAROLE 129 (2002).

5. ABADINSKY, *supra* note 3, at 206.

6. *Id.* Today, open ended sentences are known as indeterminate sentences.

7. *Id.*

8. *Id.*

9. *Id.* at 207.

10. *Id.*

United States, save one, included some sort of inmate parole provision.¹¹

According to the Supreme Court of the United States, parole in the United States is not an ad hoc exercise of clemency.¹² Instead, parole serves a dual purpose: First, it helps individuals reintegrate into society as constructive individuals, and second, it alleviates societal costs of keeping an individual in prison for his or her entire sentencing term.¹³ Parole makes release from prison a privilege that must be earned.¹⁴

This privilege is granted rarely to inmates serving life sentences in California. As criminologist Jonathan Simon notes, of the approximately 30,000 California inmates serving life sentences, approximately five are released on parole each year, while 1,000 enter.¹⁵

B. California Prison/Parole Statistics

Approximately ninety-five percent of criminal prisoners in California serve determinate sentences, which are sentences of a specific, fixed amount of time after which prisoners are automatically released on parole.¹⁶ Less serious offenses, including most felonies, are punished through determinate sentences.¹⁷ As this Note focuses on parole for prisoners serving indeterminate sentences, there will be no further discussion of determinate sentences. However, it is important to note that the vast majority of criminal inmates in California serve determinate sentences.

The remaining five percent of criminal inmates—mostly persons convicted of first degree murder, second degree murder, and third strike offenses—receive and serve indeterminate sentences, often referred to as “life sentences.”¹⁸ According to the Sentencing Project,

11. ALEXANDER W. PISCIOTTA, *BENEVOLENT REPRESSION* 27 (1994).

12. See *Morrissey v. Brewer*, 408 U.S. 471, 477 (establishing that due process imposes certain minimum procedural requirements that must be satisfied before parole can be revoked).

13. *Id.*

14. PEGGY BURKE, *ABOLISHING PAROLE: WHY THE EMPEROR HAS NO CLOTHES* 25 (1995).

15. Cockrell, *supra* note 1.

16. *Id.* (on statistics); ABADINSKY, *supra* note 3, at 213 (defining determinate sentence).

17. Cockrell, *supra* note 1.

18. *Id.*; see also Rachel Cotton, *Time to Move On: The California Parole Board's Fixation with the Original Crime*, 27 YALE L. & POL'Y REV. 239, 245–46 n.10 (2008) (stating indeterminate sentences are also given for the following crimes: “first degree murder without a special circumstance, attempted first degree murder, conspiracy to

of the 170,000 prisoners in the California prison system, 34,164 serve life sentences.¹⁹

The California Supreme Court has explained that an indeterminate sentence means that the Board of Parole Hearings (“the Board”) “can in its discretion release the defendant on parole.”²⁰ While some indeterminate sentences specify a minimum prison term²¹ (such as “fifteen years to life”), “other statutes specifying indeterminate sentences do not mention a minimum term.”²² Indeterminate sentences that do not specify a minimum term describe the sentence only as “imprisonment in the state prison for life with the possibility of parole” or “imprisonment in the state prison for life.”²³

C. An Overview of the California Parole System

1. *Origins of Parole in California*

California adopted parole in 1893.²⁴ Although there is no “constitutional or inherent right to parole” in California,²⁵ the California Penal Code specifies that the Board “shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration.”²⁶ The California Supreme Court has stated that California parole applicants serving indeterminate life sentences have an expectation that they will be granted parole “unless the Board finds, in the exercise of its

commit first degree murder, second degree murder, kidnapping and certain repeat offenses”).

19. Moore, *supra* note 2.

20. See *People v. Jefferson*, 980 P.2d 441, 445 (Cal. 1999) (explaining the indeterminate and determinate sentencing systems).

21. *Id.* The minimum prison term for first degree murder is generally twenty-five years to life; the minimum prison term for second degree murder is generally fifteen years to life. *Id.*

22. *Id.*

23. *Id.* Examples of crimes that qualify for this type of indeterminate sentencing are: attempted premeditated murder, torture, and several types of kidnapping. *Id.*

24. JONATHAN SIMON, POOR DISCIPLINE 45 (1993).

25. *Johnson v. Estelle*, No. 91-5537, (9th Cir. June 11, 1992) (citing *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979)).

26. CAL. PENAL CODE § 3041(b) (2009).

discretion, that they are unsuitable for parole in light of the circumstances specified by the statute and by regulation.”²⁷

As discussed above, relatively few prisoners serving indeterminate sentences in California actually receive parole.²⁸ Under Governor George Deukmejian’s administration (Republican; 1983-1991), indeterminate life inmates received parole five percent of the time.²⁹ Under Governor Pete Wilson (Republican; 1991-1999), indeterminate inmates received parole one percent of the time. Governor Gray Davis (Democrat; 1999-2003) granted parole to six individuals during his time in office, “five of them women whose crimes stemmed from domestic abuse.”³⁰ As of 2008, Governor Schwarzenegger (Republican) had granted parole to approximately 192 life inmates.³¹

The following sub-sections will discuss the key players that determine parole in California, as well as the factors used to determine parole suitability. In determining whether to release an inmate on parole, public safety remains the most important consideration.

2. *The Decisionmakers: Board of Parole Hearings and the Governor*

a. The Board of Parole Hearings

The Board is the administrative agency within the executive branch authorized to grant parole and set release dates.³² The Board can withdraw a parole date for cause and its “discretion in parole matters has been described as great and almost unlimited.”³³

27. See *In re Rosenkrantz*, 29 Cal. 4th 616, 654 (2002) (holding that a writ of habeas corpus is appropriate where the denial of parole is based solely on the nature of the commitment offense, and if a significant amount of time has passed since the crime, evidence of the inmate’s rehabilitation is uncontroverted, and the crime was not committed in such a heinous manner as to undermine the evidence that the inmate no longer poses a danger to society).

28. JONATHAN SIMON, *GOVERNING THROUGH CRIME*, 160 (2007).

29. *Id.*

30. Carol J. Williams, *When California Denies a Murderer Parole, Should It Need a Reason?*, L.A. TIMES, Dec. 13, 2009, available at <http://articles.latimes.com/2009/dec/13/local/la-me-parole-suits13-2009dec13>.

31. Maura Dolan and Michael Rothfeld, *High Court Sides with Parolee*, L.A. TIMES, Aug. 22, 2008, available at <http://articles.latimes.com/2008/aug/22/local/me-parole22/3>.

32. CAL. PEN. CODE § 3041 (2009).

33. See *In re Powell*, 45 Cal. 3d 894, 902 (1988) (holding that while the Board of Parole Hearings may not rescind a parole date arbitrarily or capriciously, it does not abuse its broad discretion when it has some basis in fact for the decision); see also *In re Sturm*, 11

The Board is comprised of seventeen members.³⁴ Each member is appointed by the Governor and subject to state senate appointment.³⁵ The majority of Board members are former law enforcement officers.³⁶

b. The Governor

After the Board recommends, denies, revokes or suspends parole for a person sentenced to an indeterminate prison term, the Governor has thirty days to reverse or modify the decision.³⁷ If the Governor decides to reverse or modify a Board decision, he must send a written statement to the inmate specifying his reasons.³⁸ The Governor has held this constitutional authority to review the Board's parole decisions since 1998.³⁹

The Governor's review is "limited to the same considerations" that inform the Board's decision to affirm, modify or reverse parole.⁴⁰ The paramount consideration for both the Board and the Governor is whether the inmate currently poses a threat to public safety and thus may not be released on parole.⁴¹

3. *Factors Used to Determine Parole Suitability*

The Board's criteria in setting parole dates for individuals convicted of murder committed after 1978 is published in Title 15 of

Cal. 3d 258, 273 (1974) (requiring a precursor to the Board of Parole Hearings to support denials of parole with a written, definitive statement of its reasons and to communicate this statement to the inmate concerned).

34. California Department of Corrections and Rehabilitation, The Board of Parole Hearings, http://www.cdcr.ca.gov/Divisions_Boards/BOPH/index.html (last visited Mar. 20, 2010).

35. *Id.*

36. See Jennifer Warren, *Panel Backs Gov.'s Parole Board Picks*, L.A. TIMES, Jan. 27, 2005, at B6 (describing criticisms of the board, centering on lack of professional diversity). See also Michael Rothfeld, *State parole board gets a grilling*, L.A. TIMES, July 6, 2008, <http://articles.latimes.com/2008/jul/06/local/me-parole6> (discussing Democrat Don Perata's challenges to Governor Schwarzenegger's appointment of law enforcement officials to the Board).

37. CAL. PENAL CODE § 3041.2(a) (2009).

38. CAL. PENAL CODE § 3041.2(b) (2009).

39. See *In re Rosenkrantz*, 29 Cal. 4th at 616, 658–59. In November 1988, Californians passed Proposition 89, amending the California Constitution to include Article V, section 8(b). Article V, section 8(b) granted the Governor constitutional authority to review the Board's parole decisions for inmates serving indeterminate sentences. Prior to November, 1988, the power to grant or deny parole was statutory and committed exclusively to the judgment and discretion of the Board. *Id.* at 659.

40. *Id.* at 625.

41. *In re Dannenberg*, 34 Cal. 4th 1061, 1069–70 (2005).

the California Code of Regulations.⁴² Title 15 states that decision-makers shall consider all relevant information when determining parole suitability.⁴³ Relevant information includes: the prisoner's social history, past and present mental state, past criminal history, the base and other commitment offenses, past and present attitude toward the crime, any conditions of treatment or control, and any other information that bears on the prisoner's suitability for release.⁴⁴

Title 15 also includes a list of circumstances tending to show unsuitability.⁴⁵ Factors supporting unsuitability include: a previous record of violence, a trivial motive for the crime, an unstable social history, sadistic sexual offenses, severe mental problems, and misconduct in prison.⁴⁶ Further, committing the initial offense in an especially heinous, atrocious or cruel manner supports unsuitability.⁴⁷ Factors that indicate "heinousness" include: attacking multiple victims, carrying out the offense in a "dispassionate and calculated manner," abusing, defiling, or mutilating the victim during or after the offense, carrying out the offense in "a manner which demonstrates an exceptionally callous disregard for human suffering," or having an "inexplicable or very trivial" motive for the crime in relation to the offense.⁴⁸

II. Federal and State Law Governing the Due Process Rights of Prisoners

California's parole review process must comport with federal and state due process rights.⁴⁹

A. Federal Due Process Law

The Fourteenth Amendment mandates that no state may deprive any person of life, liberty or property without due process of law.⁵⁰ Although lawfully imprisoned inmates have fewer rights than

42. CAL. CODE REGS. tit. 15 § 2402 (2009). The Governor must also abide by Title 15 criteria when deciding whether to revoke parole. CAL. CONST. art. V, § 8(b).

43. *Id.*

44. CAL. CODE REGS. tit. 15, § 2402(b) (2009).

45. *Id.*

46. CAL. CODE REGS. tit. 15, § 2402(c) (2009).

47. *Id.*

48. *Id.*

49. Alexander Mircheff, *In Re Dannenberg: California Forgoes Meaningful Judicial Review of Parole Denials*, 39 LOY. L.A. L. REV. 907, 929–30 (2006).

50. U.S. CONST. amend. XIV, § 1.

ordinary citizens, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."⁵¹ Prisoners may not be deprived of life, liberty or property without due process of law.⁵² However, the rights of prisoners under the Due Process Clause can be "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed."⁵³

When the state creates a right and recognizes that deprivation of that right is sanctionable, the prisoner's interest is deemed within the Fourteenth Amendment's liberty interest.⁵⁴ Thus, the prisoner is entitled to "procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."⁵⁵ Indeed, the touchstone of federal due process is the "protection of the individual against arbitrary action of the government."⁵⁶

The Supreme Court of the United States has concluded that mandatory language in a state's parole scheme can create a protected liberty interest in conditional release on parole.⁵⁷ However, in *Hewitt v. Helms*, the Court stated that the Due Process Clause standing alone confers no liberty interest in freedom from state action taken "within the sentence imposed."⁵⁸ The Ninth Circuit has held that California inmates have a liberty interest in parole.⁵⁹

Under federal law, due process is afforded to inmates denied parole when an inmate is afforded an opportunity to be heard at the parole hearing, and if parole is denied, the inmate is informed "in what respect he falls short of qualifying."⁶⁰

The Ninth Circuit has warned against continued reliance on unchanging factors to deny parole, as doing so can turn an indeterminate sentence into an effective life sentence without the possibility of parole.⁶¹ As the Ninth Circuit observed, denying parole based solely on factors beyond the prisoner's control "runs contrary

51. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

52. *Id.* at 556.

53. *Id.*

54. *Id.* at 557.

55. *Id.*

56. *Id.* at 558.

57. *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979).

58. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

59. *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006).

60. *Greenholtz*, 442 U.S. at 16.

61. *Biggs v. Terhune*, 334 F.3d 910, 916 (9th Cir. 2003).

to the rehabilitative goals espoused by the prison system and could result in a due process violation.”⁶²

The Supreme Court requires a modicum of evidence to support a decision to deny parole. “Requiring a modicum of evidence to support a decision . . . will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens.”⁶³

B. California Due Process Law

The California Supreme Court has held that, with regard to review of decisions by a prison disciplinary board, the due process clause is satisfied, as long as there is “some basis in fact” and “some evidence” to support the board’s findings.⁶⁴ “The [Board] acts properly in determining unsuitability [for parole], and the inmate receives all constitutional process due, if the Board provides the requisite procedural rights, applies relevant standards, and renders a decision supported by ‘some evidence.’”⁶⁵ Further, “no inmate may be imprisoned beyond a period that is *constitutionally proportionate* to the commitment offense or offenses.”⁶⁶

The two seminal cases governing parole for life inmates in California are *In re Rosenkrantz* and *In re Dannenberg*. In its 2002 *Rosenkrantz* decision, the California Supreme Court held that the Governor’s, as well as the Board’s, decisions regarding parole are subject to limited judicial review in order to ensure that parole decisions “are supported by a modicum of evidence and are not arbitrary and capricious.”⁶⁷ Further, *Rosenkrantz* stated that the Board and the Governor must base a decision to deny parole on “some evidence in the record.”⁶⁸ The Court stated that denying parole based upon the circumstances of the commitment offense could violate state due process rights when “no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for the offense.”⁶⁹ Hence, the Court stated that when evaluating whether an inmate

62. *Id.*

63. Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 456 (1985).

64. *In re Powell*, 45 Cal. 3d at 904.

65. *In re Dannenberg*, 34 Cal. 4th at 1071.

66. *Id.*

67. *In re Rosenkrantz*, 29 Cal. 4th at 626.

68. *Id.*

69. *Id.* at 683.

continued to pose a threat to public safety, the Board and the Governor must consider all relevant statutory factors.⁷⁰

In its 2005 *Dannenberg* decision, the California Supreme Court reiterated the “some evidence” standard of review.⁷¹ Further, the court held that the Board need not engage in a “comparative proportionality analysis with respect to offense[s] of similar gravity and magnitude” in order to determine an inmate’s suitability for parole.⁷² The court also reaffirmed that the primary consideration for the Board in determining an inmate’s parole suitability is public safety.⁷³

In the years following *Dannenberg*, growing tensions “emerged in the decisions regarding the precise contours of the ‘some evidence’ standard of review.”⁷⁴ In every published judicial opinion addressing the ‘some evidence’ standard, the decision of the Board or the Governor to deny or reverse a grant of parole had been founded in part or in whole upon a finding that the inmate committed the offense in an especially heinous manner.⁷⁵ The court stated that in several instances, “the circumstances of the underlying offense, remote in time and attenuated by post-conviction rehabilitation, [bore] little relationship to . . . whether the inmate *remain[ed]* a threat to public safety.”⁷⁶

In 2007, the Ninth Circuit stated that in some cases, indefinite detention based solely on an inmate’s commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from the relevant California statutes.⁷⁷

C. *In re Lawrence*

In re Lawrence is the California Supreme Court’s most recent ruling on due process protections for life inmates serving indeterminate sentences.⁷⁸ In *In re Lawrence*, the court clarified that due process is upheld in denying parole for an indeterminate inmate

70. *Id.* at 655.

71. *In re Dannenberg*, 34 Cal. 4th at 1084.

72. *Id.* at 1077.

73. *Id.* at 1084.

74. *In re Lawrence*, 44 Cal. 4th 1181, 1206 (2008).

75. *Id.*

76. *Id.*

77. *Irons v. Carey*, 505 F.3d 846, 854 (9th. Cir. 2007).

78. *In re Lawrence*, 44 Cal. 4th at 1206.

when the circumstances of the commitment offense, when considered in light of other facts in the record, continue to predict current dangerousness.⁷⁹

The court also addressed the arbitrary results occurring when lower courts denied parole to indeterminate inmates based primarily on the severity of the initial offense.⁸⁰ It found that in many cases, the gravity of the commitment offense was the sole determinative factor in denying parole.⁸¹ The court ultimately ruled that the Board and the Governor cannot use the initial commitment offense as the sole factor in denying parole, unless other statutory factors also support the parole denial.⁸²

1. *Examination of In re Lawrence*

In 1971, twenty-four-year-old Sandra Davis Lawrence murdered Rubye Williams, the wife of Ms. Lawrence's lover.⁸³ Dr. Williams, Ms. Lawrence's lover and a married dentist, had repeatedly promised to divorce his wife and marry Ms. Lawrence.⁸⁴ He did no such thing.⁸⁵ Instead, on February 13, 1971, Dr. Williams broke off his relationship with Ms. Lawrence, leaving Ms. Lawrence "enraged."⁸⁶

Ms. Lawrence immediately directed her anger at Mrs. Williams instead of Mr. Williams, believing Mrs. Williams stood as an obstacle to happiness with Mr. Williams.⁸⁷ Later that day, Ms. Lawrence armed herself with a potato peeler and a pistol and drove to Dr. Williams' office, intending to confront Mrs. Williams.⁸⁸ When Ms. Lawrence arrived at Dr. Williams' office, Mrs. Williams was present.⁸⁹ The two women began arguing and began to physically push and struggle with each other.⁹⁰ At some point, Ms. Lawrence fired at Mrs. Williams with the pistol.⁹¹ Ms. Lawrence wounded Mrs. Williams in

79. *Id.* at 1191.

80. *Id.* at 1215.

81. *Id.*

82. *Id.*

83. *Id.* at 1192.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1192-93.

88. *Id.* at 1193.

89. *Id.*

90. *Id.*

91. *Id.*

the hand, arm, leg and neck and then stabbed Mrs. Williams "repeatedly with the potato peeler."⁹² Mrs. Williams died as a result of the wounds inflicted by Ms. Lawrence.⁹³

After the murder, Ms. Lawrence fled California, remaining out of state until 1982.⁹⁴ In 1982, Ms. Lawrence voluntarily returned to California, turned herself in to authorities and declined a plea bargain where she would have served two years in prison.⁹⁵ In 1983, the case went to trial and a jury convicted Ms. Lawrence of first degree murder, sentencing her to life in prison.⁹⁶ A minimum parole eligibility date was set for November 1990.⁹⁷ Although Ms. Lawrence initially pled not guilty and initially denied her role as murderer, she later accepted full responsibility for the crime.⁹⁸

Aside from two minor administrative violations, Ms. Lawrence served as a model inmate throughout the twenty-three years spent in state prison. She incurred no serious discipline violations.⁹⁹ She lived in housing reserved for other discipline-free inmates, she worked as a plumber for the prison, she participated in tutoring programs, physical fitness programs, Toastmasters International, and the Friends Outside parenting program.¹⁰⁰

Ms. Lawrence's psychological reports detail incremental acceptance and understanding of her crime.¹⁰¹ Her 1984 psychological report stated that she was "narcissistic, lacked emotional insight, repressed her emotions, and avoided reality through excessive activity."¹⁰² However, by 1989, psychological reports "provided a positive review of [Ms. Lawrence's] health, intelligence, and overall psychological condition."¹⁰³ Indeed, when reviewing Ms. Lawrence's psychiatric history, the *In re Lawrence* court found that five psychologists conducting twelve separate evaluations since 1993

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1194. At the time of Ms. Lawrence's sentencing, life in prison was the "standard statutory penalty for such offenses committed prior to November 8, 1978." *Id.*

97. *Id.*

98. *Id.* 4th at 1195-98.

99. *Id.* at 1194.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

concluded that Ms. Lawrence did not represent a significant danger to public safety.¹⁰⁴

The Board first recommended Ms. Lawrence for parole in 1993, finding that Ms. Lawrence committed the crime “as a result of significant stress, and had demonstrated a motivation, growth, and a greater understanding of herself and the crime.”¹⁰⁵ Governor Pete Wilson reversed the recommendation, finding public safety might require a longer incarceration and that Ms. Lawrence had yet to serve a punishment proportionate to the seriousness of the crime.¹⁰⁶ In November 2002, the Board again recommended Ms. Lawrence for parole.¹⁰⁷ Governor Gray Davis reversed the recommendation in 2003.¹⁰⁸

In May 2004, the Board recommended Ms. Lawrence for parole for the third time, finding that Ms. Lawrence had no serious rule violations, did not pose a danger to public safety and understood the seriousness of her crime.¹⁰⁹ Governor Arnold Schwarzenegger reversed, stating that Ms. Lawrence would pose a danger to public safety because of the nature of her commitment offense.¹¹⁰ The Governor found that Ms. Lawrence committed a vicious crime for “an ‘incredibly petty’ reason.”¹¹¹

The Board recommended parole for the fourth time in August 2005.¹¹² By this time, Ms. Lawrence had obtained a master’s degree in business administration, served as a physical fitness trainer for prisoners, updated her computer skills, participated in several social programs geared towards rehabilitation, and was accepted into a prisoner reentry program.¹¹³ In its recommendation, the Board again emphasized that Ms. Lawrence committed murder out of stress and her possibility of recidivism was low due to her maturation and growth.¹¹⁴ However, in January 2006, the Governor again reversed

104. *Id.* at 1195.

105. *Id.*

106. *Id.* at 1196.

107. *Id.*

108. *Id.* at 1197.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1197–98.

114. *Id.* at 1197.

the Board's decision.¹¹⁵ While lauding Ms. Lawrence's vocational and rehabilitative training, Governor Schwarzenegger refused parole based on the gravity of Ms. Lawrence's commitment offense.¹¹⁶

Ms. Lawrence filed a petition for a writ of habeas corpus.¹¹⁷ The court of appeal, in a split decision, reversed the Governor.¹¹⁸ The majority found that the Governor's decision was not supported by some evidence indicating Ms. Lawrence posed an unreasonable threat to public safety if released on parole.¹¹⁹ The court of appeal reinstated parole to Ms. Lawrence.¹²⁰ Ms. Lawrence was paroled on July 11, 2007.¹²¹

In deciding *In re Lawrence*, the California Supreme Court rejected the Attorney General's argument that the aggravated circumstances of a commitment offense inherently assess current dangerousness and that the existence of some evidence demonstrating the that offense was aggravated beyond the minimum elements of the offense is sufficient to support the conclusion that an inmate is currently dangerous.¹²² The California Supreme Court found that it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole.¹²³ Rather, it is the implication of future dangerousness deriving from the inmate committing the crime.¹²⁴ Because the parole decisions consist of predictions concerning the future, "rarely (if ever) will the existence of a single isolated fact . . . support or refute [a parole] decision."¹²⁵

The court stated that consideration of the commitment offense is important because it testifies to the fact that the prisoner was a danger to the public at or around the time of his or her commission of the offense.¹²⁶ Absent affirmative evidence of a change in the prisoner's demeanor and mental state, the circumstances of the commitment offense may continue to be probative of the prisoner's

115. *Id.* at 1199.

116. *Id.* at 1200.

117. *Id.* at 1201.

118. *Id.*

119. *Id.* at 1200–01.

120. *Id.*

121. *Id.* at 1201.

122. *Id.* at 1213.

123. *Id.*

124. *Id.*

125. *Id.* at 1214.

126. *Id.* at 1219.

dangerousness for some time in the future.¹²⁷ At some point however, affirmative evidence may prove that commitment offense no longer constitutes a reliable indicator of the prisoner's current dangerousness.¹²⁸

III. Argument In Favor of Prohibiting Consideration of the Commitment Offense

Two law review articles written before *In re Lawrence* advocate eliminating the Board's ability to deny parole based on the circumstances of the commitment offense.¹²⁹ In his article *California's Inequitable Parole System*, Daniel Weiss explores several flaws within the system and recommends three major reforms.¹³⁰ In particular, Weiss suggests that the Board should eliminate consideration of any retributive, backward-looking factors when considering parole suitability.¹³¹ Under Weiss' approach, the Board could consider only "rehabilitative, forward-looking factors,"¹³² such as "treatment, release plans, job skills, letters of support, and psychological reports."¹³³ However, the Board could not consider the commitment offense or an inmate's prior criminal history.¹³⁴

Weiss also argues that the Board should consider only forward-looking factors because it lacks firsthand information about the commitment offense and the original trial, but does possess firsthand knowledge of the rehabilitated inmate.¹³⁵ Further, Weiss argues that

127. *Id.*

128. *Id.*

129. Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1588, 1599 (2005); Christopher Mock, Note, *Parole Suitability Determinations in California: Ambiguous, Arbitrary and Illusory*, 17 S. CAL. REV. L. & SOC. JUST. 889, 909 (2008). See also Rachel Cotton, *Time to Move On: The California Parole Board's Fixation with the Original Crime*, 27 YALE L. & POL'Y REV. 239, 245-46 (2008) (arguing that California should place less of an emphasis on the commitment offense).

130. Weiss, *supra* note 129, at 1576. Weiss' three suggestions for reform are: (1) a legislative restructuring of the sentencing matrix that would permit judicial discretion in deviating from the matrix in certain circumstances; (2) the Board considering only forward-looking factors for purposes of parole suitability; (3) eliminating the Governor's ability to reverse a Board determination of parole suitability. *Id.*

131. *Id.* at 1599. Weiss does not discuss whether the Governor should eliminate retributive factors during the Governor's *de novo* review of parole suitability. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

the Board should only concern itself with inmates' present states of mind, rather than the inmate's state of mind at the time of the original offense.¹³⁶ Weiss writes, "[a]llowing the Board to focus on backward-looking factors corrupts its view as to whether the inmate, in the present, can [currently] operate as a law-abiding person in society."¹³⁷ If the Board considered only rehabilitative factors, inmates could "control their potential for parole by controlling their rehabilitation, rather than waiting for the Board to determine that they have served the appropriate amount of time for their crimes."¹³⁸

In a 2008 law review article, Christopher Mock concurs with Weiss' argument that the Board should only consider rehabilitative factors in establishing parole suitability.¹³⁹ Mock argues that severity of the commitment offense is an unreliable predictor of future violence.¹⁴⁰ Citing several scientific studies, Mock argues that a lack of correlation between the circumstances of an inmate's commitment offense and the inmate's future risk of danger to public safety supports eliminating consideration of the commitment offense from determinations of parole suitability.¹⁴¹ Mock argues that public safety, the overarching consideration of whether to grant parole, is not furthered by consideration of a commitment offense.¹⁴²

IV. Argument Against Eliminating Consideration of the Commitment Offense

Eliminating consideration of the commitment offense post-*In re Lawrence* is a mistake for three reasons. First, that decision clarifies that consideration of the commitment offense, when balanced by other statutory factors, comports with due process. Second, consideration of the commitment offense, in some cases, may contribute to an inmate's due process protections. Finally, the Board lacks sufficient firsthand knowledge of the inmate to warrant eliminating consideration of the commitment offense.

136. *Id.* at 1599–1600.

137. *Id.* at 1600.

138. *Id.* at 1601. Weiss also advanced a "double counting" argument, referring to situations in which the Parole Board of the Governor extend the inmate's incarceration beyond the judicially imposed minimum term solely on the severity of the commitment offense. This is no longer permissible under *Lawrence*. *Id.*

139. Mock, *supra* note 129, at 911.

140. *Id.*

141. *Id.* at 909–11.

142. *Id.* at 911.

A. There Is No Due Process Rationale for Eliminating Consideration of the Commitment Offense

In re Lawrence does not perfect the grossly imperfect California parole system. It does, however, clarify that there is no due process rationale for eliminating consideration of the commitment offense.

The touchstone of due process is the protection of the individual against the arbitrary action of the government.¹⁴³ *In re Lawrence* solidifies an inmate's protection against an arbitrary denial of parole by insisting that multiple factors support a denial of parole.¹⁴⁴ As long as a parole denial meets the requirements of *In re Lawrence* and an inmate denied parole is afforded an opportunity to be heard at parole hearings and an explanation of why he fell short of qualifying, the process comports with federal and state due process.¹⁴⁵

In re Lawrence also protects against constant parole denials based on an unchanging factor beyond the inmate's control.¹⁴⁶ Although the inmate cannot change the circumstances of the initial commitment offense, courts must balance the commitment offense against factors the individual can change, such as behavior while institutionalized, stable social relationships, and that rehabilitative activities suggest an enhanced ability to function within the law upon release.¹⁴⁷

As long as parole denial or revocation is supported by factors in addition to the gravity of the initial commitment offense, the parole denial or revocation falls within the similar "modicum of evidence" and "some evidence" standards required by the Supreme Court and the California Supreme Court, respectively.¹⁴⁸ Also, judicial review provides a final check on the constitutionality of post-*In re Lawrence* parole revocations and denials.¹⁴⁹ Therefore, there is no due process rationale for eliminating consideration of the commitment offense post-*In re Lawrence*.

143. *Wolff*, 418 U.S. at 555.

144. *In re Lawrence*, 44 Cal. 4th at 1221.

145. *Greenholtz*, 442 U.S. at 7.

146. See *In re Lawrence*, 44 Cal. 4th 1181; *Biggs*, 334 F.3d at 916 (cautioning against parole denials based solely on an unchanging factor beyond an inmate's control).

147. CAL. CODE REGS. tit. 15, § 2402 (2009).

148. *In re Powell*, 45 Cal. 3d at 904; *In re Lawrence*, 44 Cal. 4th at 1205.

149. *In re Dannenberg*, 34 Cal. 4th at 1071.

B. Eliminating Consideration of the Commitment Offense and Other Backward Looking Factors Could Prove Prejudicial or Harmful

Mock argues that an inmate's commitment offense should not be considered because it does not accurately predict an inmate's future risk to the public.¹⁵⁰ This assertion is limited: It considers the obvious case of a dangerous crime creating the implication that more dangerous crimes are to come. However, consideration of the commitment offense can be more than a simplistic propensity assessment. Eliminating consideration of the commitment offense would *hurt* inmates whose commitment offenses establish unique circumstances unlikely to again occur. In *In re Lawrence*, for example, the circumstances surrounding Ms. Lawrence's commitment offense contributed to the Board's parole recommendation.¹⁵¹ The Board emphasized that a twenty-four-year-old Ms. Lawrence killed her lover's wife out of stress and misdirected anger.¹⁵² When coupled with Ms. Lawrence's rehabilitative gains, it became clear that the unique brew of stress, youth, and misdirected anger present during the commitment offense were highly unlikely to again lead Ms. Lawrence to murder.¹⁵³ Thus, consideration of the circumstances surrounding Ms. Lawrence's commitment offense helped the Board, and the California Supreme Court, determine that Ms. Lawrence posed an unlikely danger to society and met parole suitability requirements.

Also, propensity is not the only way a commitment offense can bear on current dangerousness. Knowledge of the commitment offense is necessary to gauge whether an inmate has been sufficiently rehabilitated. Further, it assists in establishing factors and programs that should be stressed during an inmate's rehabilitation period. Ms. Lawrence, for example, would benefit from a rehabilitation focusing on her ability to handle stress and engage in mature relationships. In contrast, another inmate with a history of violence who killed someone after a bar brawl would benefit more from a series of violence prevention classes throughout the course of her rehabilitation.

150. Mock, *supra* note 129, at 911.

151. See *In re Lawrence*, 44 Cal. 4th at 1225 (finding that Ms. Lawrence "committed the murder while under the stress of an emotional love triangle").

152. *Id.* at 1225–26.

153. *Id.* at 1225.

Furthermore, the commitment offense is only one of several backward-looking considerations at issue. Eliminating consideration of all backward looking offenses would remove the following factors from consideration: previous record of violence, previous psychological experiences, unstable social history, sadistic sexual offenses committed prior to the inmate's current prison term, and motivation for the original crime.¹⁵⁴ It is one thing to observe that a single crime does not mark a person as a violent danger for life. It is another to blind the Board to the full scope of an inmate's past. Psychological issues develop through a myriad of past experiences. For public safety reasons, the Board and the Governor should consider an inmate's experience of sexual offenses, mental illness, and psychological experiences as totality of the circumstances. When consideration of such factors is restricted to beginning at the point the inmate first started serving his sentence, the Board and the Governor lose valuable information on the workings of an inmate's mind and factors that may influence an inmate's threat to public safety. Indeed, it seems especially misguided to limit the analysis to the inmate's conduct while in the controlled atmosphere of prison, when the critical determination is whether an inmate will pose a danger once he or she gets out. Also, proponents of eliminating the commitment offense fail to explain to what extent eliminating consideration of the commitment offense would affect eliminating affirmative defenses for indeterminate inmates. For example, would elimination of the commitment offense also bar information concerning a murderer's affirmative defense as the subject of domestic abuse?

In summary, consideration of the commitment offense is necessary to gauge the scope of rehabilitative work and gauge a full understanding of the prisoner.

C. The Board Lacks Sufficient First-Hand Knowledge of an Inmate to Warrant Eliminating Consideration of the Commitment Offense

Weiss argues that the Board should consider only rehabilitative, forward-looking factors because it lacks firsthand information about the commitment offense and the original trial, but it does possess firsthand knowledge of the rehabilitated inmate.¹⁵⁵ This argument is weak. The Board's primary firsthand interaction with the inmate occurs when the inmate sits in front of the Board at hearings. The

154. CAL. CODE REGS. tit. 15, § 2402 (2009).

155. Weiss, *supra* note 129, at 1599.

Board does not see the inmate on a day-to-day basis and Board members do not individually observe and write reports on the inmates.

Conclusion

Pre-*In re Lawrence* law may have resulted in due process violations by allowing the Board or the Governor to deny parole in all instances a commitment offense was found particularly egregious. *In re Lawrence* provides a floor under which the Board and the Governor, in deciding to grant or revoke parole, cannot fall below. Under *In re Lawrence*, an inmate's due process rights are violated if the Board or the Governor relies solely on the circumstances of the underlying commitment offense in denying parole, when other statutory considerations support parole. As such, *In re Lawrence* negates the argument that the Board and the Governor should consider only rehabilitative and forward looking factors in making parole determinations. Maintaining consideration of the commitment offense and other backward-looking factors when deciding parole is important for inmates whose commitment offenses establish unique circumstances unlikely to again occur.